IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

MOTION FOR RELIEF FROM CONDITIONS OF CONFINEMENT AND TO SET EXPEDITED BRIEFING AND HEARING SCHEDULE

COMES NOW the prisoner, Zacarias Moussaoui ("Moussaoui"), by counsel, and for the reasons set forth in the memorandum accompanying this motion, moves the United States District Court for the Eastern District of Virginia for an Order directing that relief be given from the overly restrictive and oppressive conditions of confinement that prevent him from mounting an effective defense. The Court is respectfully requested to set an expedited briefing and hearing schedule.

ZACARIAS MOUSSAOUI
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Relief from Conditions of Confinement and to Set Expedited Briefing and Hearing Schedule was served via facsimile and first class mail upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 12th day of April, 2002.

/S/
Frank W. Dunham, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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UNITED STATES OF AMERICA,	)	
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v.	)	Crim. No. 01-455-A
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ZACARIAS MOUSSAOUI	)	

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM CONDITIONS OF CONFINEMENT AND TO SET EXPEDITED BRIEFING AND HEARING SCHEDULE

The prisoner, Zacarias Moussaoui ("Moussaoui"), seeks an Order from the United States District Court for the Eastern District of Virginia (the "Court") directing the government to provide relief from certain overly restrictive and repressive conditions of his confinement. These conditions are the product of Special Administrative Measures ("SAM")[1] that govern Moussaoui's pretrial detention and any ordinary requirements of the United States Marshals Service ("USMS") that are more restrictive than the SAM (*see* SAM ¶ 1.a.). Although the stated purpose of the SAM is to limit contacts and communications in furtherance of criminal activity (*see* SAM "Conclusion"), the SAM's actual effect, when taken in combination with those ordinary USMS conditions that are more restrictive than the SAM, is to establish conditions of confinement that, if not modified, may insure the death of Moussaoui by denying him a fair opportunity to mount an effective defense.

Specifically, the conditions of confinement imposed because of the SAM preclude Moussaoui from exercising his rights (i) to participate in the preparation of his own defense, (ii) to become "fully informed" so that he can knowingly and intelligently exercise other fundamental rights, and (iii) to communicate with counsel and consultants/experts freely and securely.

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[1] The Special Administrative Measures are attached hereto as Exhibit A.

BACKGROUND

Moussaoui was in the custody of the United States on September 11, 2001. Indeed, he has been in such custody continuously since August 16, 2001, first in Minnesota, later in New York, and now in Alexandria at the City of Alexandria's Detention Center ("Alexandria Jail"). He was indicted on December 11, 2001. The indictment alleges a worldwide terrorist conspiracy dating back to 1989, the product of perhaps the most massive investigation in FBI history. At arraignment on January 2, 2002, the Court determined that the case was complex and set a trial date of September 30, 2002 at the government's request. We are advised that the discovery is so massive in this case that, in lieu of paper, almost all discovery provided by the government is to be provided on CD-ROM.[2]

On January 7, 2002, the Department of Justice directed that the SAM be adopted to govern Moussaoui's detention. The SAM set forth extraordinarily restrictive and unfair conditions of confinement for Moussaoui. They are made all the more so by the SAM provision that allows any ordinary requirements of the USMS more restrictive than the SAM to control. *See* SAM ¶ 1.a. While no one condition may seem that onerous when considered in isolation, when viewed as a whole and in light of the facts of this case and how the conditions are actually applied, they are quite lethal. Whether intended or not, the conditions of confinement create an insurmountable impediment to Moussaoui, an intelligent and well-educated man professing his innocence, from having any meaningful participation in

[2] Due to the herculean effort required to reduce discovery to this electronic medium, the defense has recently been informed that it has been given only a small fraction of what is yet to be produced. However, electronic production is the only reasonable way to handle discovery in this case.

the defense of his own life and from having full, free, and secure opportunity to communicate with counsel.[3]

ARGUMENT

I. THIS COURT HAS AUTHORITY TO SET THE TERMS AND CONDITIONS OF CONFINEMENT.

Moussaoui is not asking to be released from custody because he realizes such a request would be futile under the circumstances. Accordingly, he seeks relief from only some of the particularly oppressive conditions of his confinement that interfere with his ability to defend himself. We note, however, at the outset that the Court has the authority to order temporary release of a person in custody if the release is necessary for preparation of that person's defense. 18 U.S.C. § 3142(i) provides in that subsection's final paragraph that, following an initial order of detention:

> [t]he judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason. [Emphasis added.]

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[3] Because we are focusing on the most serious problems with the SAM, we are not now addressing their unfairness in several other respects. For example, under the pretext of "limiting the inmate's ability to communicate (send or receive) terrorist information," (SAM ¶ 1.c.), the SAM impose a gag order on Moussaoui, *i.e.*, "the inmate will not be permitted to talk with, meet, correspond with, or otherwise communicate with . . . the news media" in any way. SAM ¶ 5.a. Accordingly, in this highly publicized case where picking a fair and impartial jury will be a delicate task to say the least, and the need for balanced press coverage is imperative, the Attorney General holds press conferences to influence public opinion while he silences Moussaoui with the SAM. Similarly, any calls by Moussaoui to members of his immediate family are to be monitored by the FBI and "analyzed for indications the call is being used to pass messages soliciting or encouraging acts of violence . . . ." SAM ¶ 4.a.iv. (emphasis added). Moussaoui should be able to have unmonitored communications with members of his immediate family without FBI analysis. The insistence upon not only monitoring, but also "analyzing," such calls has the effect of totally precluding such calls.

If the Court has the power to temporarily release Moussaoui altogether, if necessary, for preparation of his defense, *a fortiori*, it can order relief from particularly onerous conditions of confinement for that same reason. Moreover, the Court has the power to issue any order necessary or appropriate in aid of the exercise of its jurisdiction. *See* 28 U.S.C. § 1651(a).

II. THE SAM INTERFERE WITH MOUSSAOUI'S RIGHT TO PARTICIPATE IN THE PREPARATION OF HIS OWN DEFENSE.

If the subject matter alone were not sufficient, over a thousand CD-ROMs full of discovery, which may include as many as 144,000 FBI 302's, make it clear that this is no ordinary case. In order to participate in his own defense, Moussaoui, with his life hanging in the balance, needs access to certain bare essentials, *i.e.*, a table or desk and chair, a cell large enough to work in and store and organize voluminous materials, a computer and portable printer so that he can have access to discovery (discovery is going to be provided by the government on an estimated 1,400 CD-ROMs) and other defense materials that already comprise several file cabinets independent of the government's discovery. The SAM work to preclude Moussaoui from having these essentials.

Notwithstanding the fact that the government has no evidence that Moussaoui has ever engaged in the conduct it seeks to prevent, SAM ¶ 1.c. prohibits Moussaoui "from having contact with other inmates . . . that could reasonably foreseeably result in [Moussaoui's] communicating information . . . that could circumvent the SAM's intent of significantly limiting [Moussaoui's] ability to communicate terrorist information." Accordingly, SAM ¶ 9.a. requires that "[t]he inmate shall be kept separated from other inmates . . . while in the cell block area," ¶ 9.b. states that "[t]he inmate shall not be allowed to communicate with any other inmate while in the cell block area," ¶¶ 6.a. and 6.b. preclude

recreation and prayer with any other inmate, and ¶¶ 7.a. and 7.b. preclude sharing a cell or being in a position to make statements audible to other inmates or to pass notes. These provisions of the SAM are implemented at the Alexandria Jail by placing Moussaoui in total isolation, *i.e.*, solitary confinement.

Moussaoui is currently housed in a small, single-inmate cell. It contains a steel toilet, steel sink, and a raised concrete platform for sleeping with little room for anything else. A bright fluorescent light shines on him 24 hours a day so that he can be constantly observed via a video camera at a monitor watched by guards. Though the video camera permits round-the-clock inspection of Moussaoui's activities, guards routinely wake him up throughout the night by opening a steel partition to look directly into the cell. He takes his recreation by himself. These conditions are those imposed on convicted prisoners who have violated the institutional rules of a prison. Yet, here they are imposed on a pretrial detainee, presumed innocent, who is trying to fight for his life by assisting in the preparation of his own defense.

The SAM do not specify what size cell Moussaoui must have. Rather, that decision has been made by the USMS and the Alexandria Jail in their effort to comply with isolation requirements of the SAM. Until the arrival of the defendant in another celebrated case, Moussaoui was housed in a cell adequate in size to hold a desk and a substantial amount of materials. However, he was moved to accommodate the new inmate and his current cell conditions barely accommodate one person. The cell provides no working surface area for Moussaoui to store, organize, work on, and review the massive materials he will have to review except for the horizontal surface of a narrow cinder block ledge running along the wall beside his bed and the bed itself.

Moussaoui not only needs more space to be able to store the estimated 1,400 CD-ROMs and other defense materials and a working surface (desk or table) and chair, he needs to be able to access the CD-ROMs on a laptop computer and print out selected documents on a portable printer. But, the SAM as applied will not permit him to have this equipment. SAM ¶ 2.j.ii. limits what defense counsel may give Moussaoui for writing or drawing materials; "[n]one of the materials provided may include pens, pencils, or other instruments which can be used to harm others." This is the so-called "crayon rule," which has been construed here to mean that Moussaoui cannot be given even the smallest of staples or paperclips holding together legal documents or even, with a few exceptions, a book with a hard cover. For writing, he is "not allowed . . . pens or pencils (other than safety pens . . .) . . . ." *See* SAM ¶ 10.a. In a case like this, in which everyone agrees that the only way the discovery and other evidence can reasonably be stored, accessed, reviewed, and used is through manipulation of hundreds of CD-ROMs, it is patently unreasonable and unfair to limit the defendant to a safety pen and pieces of paper. These limitations effectively shut Moussaoui out of his own defense, violating his due process rights. As the Supreme Court has stated:

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.

California v. Trombetta, 467 U.S. 479, 485 (1984); *accord Washington v. Texas*, 388 U.S. 14, 19 (1967) (stating that "the right to present a defense . . . is a fundamental element of due process of law"); *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (noting "the defendant's fundamental constitutional right to present a complete defense").

This right includes access to prosecution evidence, *Trombetta*, 467 U.S. at 485 (stating that "[t]o safeguard [the right to present a complete defense], the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence'") (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)), and, when such evidence is produced, the right to examine it. *See United States v. Hung*, 667 F.2d 1105, 1108 (4th Cir. 1981) (per curiam) (noting that "in the usual case when production is ordered, a client has the right to see and know what has been produced") (citing *Geders v. United States*, 425 U.S. 80 (1976), and *Faretta v. California*, 422 U.S. 806 (1975)), *cert. denied*, 454 U.S. 1144 (1982); *accord United States v. Bin Laden*, No. 98 Cr. 1023, 2001 U.S. Dist. LEXIS 719, at *12 (S.D.N.Y. Jan. 25, 2001)[4] ("It is clear that, usually, a defendant is permitted to review items which have been produced in discovery.") (Attached hereto as Exhibit B); *see also United States v. Guay*, 108 F.3d 545, 552-53 (4th Cir. 1997) (finding error with district court's failure to allow opportunity for defendant and his counsel to examine document pertinent to motion for new trial).

Moussaoui's needs spring not just from his general right to see the evidence against him, but also from more specific constitutional obligations imposed upon him. As the Supreme Court has held, a criminal defendant has "the ultimate authority [and burden] to make certain fundamental decisions regarding the case . . . ." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). For instance, the accused must decide "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id.*;

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[4] Counsel is mindful of Fourth Circuit Rule 36(c), which discourages the citation of unpublished opinions, but believes that this opinion has precedential value to an issue in this case. Pursuant to that Rule, a copy of the unpublished opinion is attached.

see also Taylor v. Illinois, 484 U.S. 400, 418 n.24 (1988) (citing with approval *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963) (waiver of right to be present during trial can only be made by defendant and not attorney)). He also has a right to decide whether to represent himself or proceed without counsel. *Faretta v. California*, 422 U.S. 806 (1975). In making the fundamental decisions necessary to the exercise of these rights, a defendant needs to be "fully informed." *See Taylor*, 484 U.S. at 417-18 (noting that basic decisions such as the ones above "cannot [be] waive[d] without the fully informed and publicly acknowledged consent of the client"). Yet, for the reasons already stated, Moussaoui cannot be fully informed unless he is provided with the discovery. This means he must have the CD-ROMs and the facilities (desk, storage space, computer and printer) to examine their content and discuss it with counsel.

Even as to those decisions that Moussaoui is not burdened with making, he still must be in a position to be able to effectively consult with his counsel. Thus, decisions involving trial strategy or tactics, which the lawyer is typically entrusted with handling, *see Wainwright v. Sykes*, 433 U.S. 72, 91 n.14 (1977) (noting prior Supreme Court cases holding that defendant is bound by "decisions of counsel relating to trial strategy"), cannot effectively be made without Moussaoui's informed input. Absent this input, defense counsel cannot provide the level of representation the Constitution demands. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); *see also Strickland v. Washington*,

466 U.S. 668 (1984) (delineating standard for "ineffective assistance" of counsel under Sixth Amendment).[5]

III. THE SAM INTERFERE WITH MOUSSAOUI'S RIGHT TO SECURE AND EFFECTIVE COMMUNICATION WITH COUNSEL.

Under the ostensible stated purpose of preventing terrorist activity, the SAM permit unwarranted intrusion into the attorney/client relationship by disrupting the security of communications between counsel and Moussaoui and by preventing consultations needed for purposes of working with counsel. Relief is needed to protect Moussaoui's Sixth Amendment rights.

a. Interference with the Right to Secure Communications with Counsel.

i. Search of Attorney/Client Privileged Information.

We start with the proposition that counsel in this case are not only officers of this Court, they also have been cleared by the government to receive national security information. The notion that they would engage in terrorist activity is beyond insulting. Accordingly, materials provided by counsel to Moussaoui as a part of the preparation of the defense should remain privileged—no one else should be allowed to see these documents. Notwithstanding, the SAM require Moussaoui's jailers to routinely search through materials given to him by his counsel. In SAM ¶ 11, the "USMS is . . . directed to search [Moussaoui's] cell frequently . . . ." The practical result of this requirement is constant

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[5] Informed consultation also is an ethical requirement. *See* VIRGINIA STATE BAR, VIRGINIA RULES OF PROFESSIONAL CONDUCT, Rule 1.2(a) (2002 ed.) ("A lawyer . . . shall consult with the client as to the means by which [the objectives of the representation] are to be pursued . . . [and] shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."). This consultation cannot be done if Moussaoui is unable, due to, for example, the lack of a computer or secure telephone access to his attorneys, to intelligently understand the issues in his case.

rummaging through attorney/client privileged material and attorney-work-product-protected information because that is essentially all Moussaoui has in his cell. Even when clearly marked "Attorney/Client Privileged," Sheriff's Deputies at the Alexandria Jail nevertheless read Moussaoui's papers given to him by counsel, the most recent incident occurring when a Deputy insisted on reading an early draft of this memorandum over Moussaoui's objection.

ii. Inability to Communicate with Counsel Privately.

In addition to the lack of security for materials given to Moussaoui by counsel, some oral communications between Moussaoui and his counsel are likewise not secure. The SAM require that legally privileged telephone calls initiated by Moussaoui "are to be placed by a USMS staff member and the telephone handed over to [Moussaoui] only after the USMS staff member confirms that the person on the other end of the line is the inmate's attorney or precleared staff member." SAM ¶ 2.h.iii.[6] The problem is that, notwithstanding footnote 5 in the SAM to the effect that "[T]his section does not allow monitoring of attorney/client privileged communications," this is exactly what happens. Moussaoui must participate in the call from his end with a jailer within hearing distance of every word he says. This same problem exists if counsel uses the attorney/client line to call Moussaoui at the jail. Court intervention is needed to facilitate that which even the SAM, as restrictive as they are, clearly contemplate, *i.e.*, secure telephonic communications between counsel and Moussaoui. If there is any hope that counsel can be ready for trial as scheduled, it turns on operating at maximum efficiency. The

[6] Actually, in these situations it is an Alexandria Sheriff's Deputy acting as an agent of the USMS.

inability to use the telephone securely in communicating with Moussaoui definitely diminishes that efficiency.

Finally, from time to time, and more frequently than we would like, the Alexandria Jail has been unable to accommodate an attorney visit with Moussaoui in an attorney/client visiting room. When this occurs, so that work on the case need not be put on hold, counsel have been accommodated by the Alexandria Jail by permitting visits through the food slot in the door to Moussaoui's cell. While we appreciate the courtesy extended, the SAM establish a set of conditions pursuant to which such a consultation could be recorded and overheard by the government. SAM ¶ 8.a. authorizes placement of microphones in hallways and elsewhere outside the defendant's cell to record any statements Moussaoui might make. Instead of precluding the use of such devices to intercept attorney/client communications, the SAM only requires that "care shall be taken so as not to conduct recording so as to overhear any meeting between the inmate and his counsel." SAM ¶ 8.d. An order from this Court stating clearly that, upon penalty of contempt, no such conversations shall be recorded and a certification requirement that none have been, would ease the apprehension of Moussaoui and counsel when visits cannot take place in an attorney/client visiting room.[7]

The government's access to the confidential attorney/client communications between Moussaoui and his counsel—whether by a Sheriff's deputy overhearing Moussaoui's end of a telephone call, by listening devices installed in jail areas where privileged communications occur, or by

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[7] The solution should not be to simply deny counsel a visit when attorney/client rooms are occupied. Cell block visits when the attorney/client visiting rooms are full are essential given the magnitude of this case—but they should not be recorded.

inspection of confidential attorney/client materials seized in Moussaoui's jail cell—impermissibly impinges upon Moussaoui's Sixth Amendment right to the effective assistance of counsel. Indeed, "[t]he essence of the Sixth Amendment right to effective assistance of counsel is . . . privacy of communication with counsel." *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981).

The reason that government incursions into confidential attorney/client communications, whether known by the defendant or not, threaten the Sixth Amendment is obvious:

> "As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."

Weatherford v. Bursey, 429 U.S. 545, 563 (1977) (Marshall, J., dissenting) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) (noting that "[t]he purpose of the [attorney-client] privilege is to encourage clients to make full disclosure to their attorneys"); *United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) (stating that "a critical component of the Sixth Amendment's guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his client and to build a 'relationship characterized by trust and confidence'") (quoting *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (Brennan, J., concurring)).[8]

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[8] The Due Process Clause also is jeopardized by government intrusions into private attorney/client communications. *See Weatherford v. Bursey*, 429 U.S. 545, 562 (1977) (Marshall, J., dissenting) (noting that "the integrity of the adversary system and the fairness of trials is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence (or lack of it), the defendant, or the defense counsel").

Thus, in *Bishop v. Rose*, 701 F.2d 1150 (6th Cir. 1983), the Sixth Circuit Court of Appeals found a Sixth Amendment violation where the prosecutor used against the defendant at trial a handwritten statement by the defendant that was seized during a search of his jail cell. The statement had been written at the request of the accused's lawyer, who had asked his client to detail his activities and movements around the time of the alleged offense. *Id.* at 1151. The statement was discovered by local jail employees conducting a lawful search of the defendant's cell and given to the prosecutor, who proceeded to make use of it at trial. *Id.* This conduct interfered with the defendant's Sixth Amendment right to the effective assistance of counsel, the Court of Appeals found, and thus it affirmed the district court's grant of a new trial for the defendant. *Id.* at 1157; *see also United States v. Jenkins*, 1999 U.S. App. LEXIS 8703, at *9 (4th Cir. May 7, 1999) (characterizing a surreptitious video recording of a defendant and his lawyer conversing at the local sheriff's office as "improper"), *cert. denied*, 528 U.S. 913 (1999) (Attached hereto as Exhibit C);[9] *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991) (observing that "[t]he use of monitored telephone calls of a pre-trial detainee violates the Constitution in certain circumstances").

Here, the monitoring of Moussaoui's private attorney/client conversations and the examination of materials given to him as a product of the attorney/client relationship impermissibly interfere with that relationship in violation of the Sixth Amendment. Accordingly, assistance from the Court is needed to prohibit incursions into the confidential communications between counsel and Moussaoui.

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[9] *See supra* note 4.

b. Interference with the Right to Effective Communications with Counsel.

The SAM permit Moussaoui to have telephone conversations with expert or fact witnesses but only in the presence of counsel on counsel's phone. *See* SAM ¶ 2.h.ii. The SAM also seem to say, however, that a consultant or potential expert witness could not meet with Moussaoui and counsel at the jail. *See* SAM ¶ 2.g. But either way, the SAM require the expert/witness to be "vetted" by the FBI. *See* SAM ¶¶ 2.a. n.1, h.ii. & n.4.

The restriction requiring vetting of potential experts/witnesses who need to be in contact with Moussaoui has already operated to bar communications with one consultant/potential witness whom we had hoped would have been able to facilitate understanding and communication between the Islamic foreigner, Moussaoui, and his undersigned non-Islamic, American, court-appointed lawyers. An Islamic scholar, referred to hereafter as John Doe, who was to consult with Moussaoui and his attorneys to aid effective communication and understanding between them, is unwilling to undergo the vetting process.[10] The SAM, and the extraordinary actions by the Attorney General towards Muslims and Arabs since September 11, have created a climate in which it will be difficult for the defense to obtain the needed Islamic advice and consultation.

Although Mr. Doe's reluctance to let the FBI know that he is willing to become associated with the Moussaoui defense effort is understandable, the combination of the SAM and the current climate greatly diminish the prospects for Moussaoui to receive the effective assistance of counsel that the Sixth

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[10] Moussaoui is permitted to have a cleric visit him solely for the purpose of prayer, *see* ¶ 6.c. of the SAM, as long as this cleric is hired by the United States Marshal Service. That is not the purpose for which this person is needed.

Amendment guarantees. Accordingly, in addition to the other relief requested herein, limited relief from the SAM is necessary to permit the defense to receive necessary advice and consultation from that Islamic scholar initially on an anonymous basis.[11]

In the context of the right to counsel, unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right. As the Supreme Court has recognized, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *see also Wolfish v. Levi*, 573 F.2d 118, 133 (2nd Cir. 1978) ("[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense."), *rev'd on other grounds, Bell v. Wolfish*, 441 U.S. 520 (1979); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (when pretrial detainees' interest in effective communication with attorneys is "inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised"); *Benjamin v. Fraser*, 264 F.3d 175, 185 (2nd Cir. 2001) (affirming district court's finding that certain jail restrictions on attorney/client visits impaired pretrial detainees' access to counsel); *cf. Smith v. Coughlin*, 748 F.2d 783, 789 (2nd Cir.1984) (ban on visits by paralegal personnel to convicted inmate violated Sixth Amendment); *Schoemehl*, 878 F.2d at 1052 (restrictions on telephone access to attorneys by pretrial detainees were "inadequately justified"); *Cobb v. Aytch*, 643 F.2d 946, 957, 960, 962 (3rd Cir. 1981) (upholding injunctive relief against pretrial transfer of detainees to distant facilities

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[11] It was our hope that, although initial meetings would be on an anonymous basis, we would ultimately be able to persuade Mr. Doe to be a witness in the case. However, the need for him to agree to be pre-cleared by the FBI before we have even begun to explore the process has shut down the entire line of pursuit.

because transfers caused "substantial interference with the right to effective assistance of counsel"); *Bell*, 441 U.S. at 547 (when institutional restriction on pretrial detainees infringes specific constitutional guarantee [*i.e.*, the Sixth Amendment], "the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security"). The Due Process Clause also assures the right of the effective assistance of counsel and the right to necessary assistance of experts. *Powell v. Alabama*, 287 U.S. 45 (1932); *Ake v. Oklahoma*, 470 U.S. 68 (1985). For reasons we would proffer to the Court *in camera* and *ex parte*, we believe the latter in this instance is necessary to insure the former.

CONCLUSION

Mr. Moussaoui, by and through his counsel, requests that this Court grant this motion for an Order to provide him relief from his current conditions of confinement, more specifically, by directing that he:

- be given a larger confinement area or cell where he can plug in a computer;
- be given a table or desk to work on and a chair inside his confinement area or cell;
- be given a laptop computer and portable printer, to be provided by the defense;
- have the right to receive and retain materials from counsel, including CD-ROMs, without having them inspected, searched, or taken from him;
- have telephone access to his attorneys without having his end of the call overheard, regardless of whether Moussaoui or his attorney initiates the call;
- have freedom from searches and/or seizures of his books, papers, computer, and other defense preparation materials in his cell;

- have freedom from recordings of conversations between Moussaoui and his counsel; and,
- have the right to visit with Mr. Doe in the presence of counsel without disclosing Doe's identity to the government, including jail staff.

Given the fact that this is a death penalty case as complex as any ever brought by the United States against anyone, Mr. Moussaoui will be denied a meaningful opportunity to participate in the preparation of his own defense and to seek and receive advice from counsel fully protected by attorney/client privilege without the relief requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Motion for Relief from Conditions of Confinement and to Set Expedited Briefing and Hearing Schedule was served via facsimile and first class mail upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 12th day of April, 2002.

/S/
Frank W. Dunham, Jr.

NOTIFICATION OF SPECIAL ADMINISTRATIVE MEASURES
January 7, 2002

SPECIAL ADMINISTRATIVE MEASURES (SAM)
Pursuant to 28 C.F.R. § 501.3(c)
USMS Inmate - Zacarias Moussaoui ("Moussaoui" or "inmate")

1. General Provisions:

a. **Adherence to Usual United States Marshals Service (USMS) Policy Requirements - in** addition to the below-listed SAK, the irmate must comply with all usual USMS policies regarding restrictions, activities, privileges, communications, etc. If there is a conflict between USMS policies and the SAM, as set forth herein, where the SAM is more restrictive than usual USMS policies, then the SAM shall control. If usual USMS policies are more restrictive than the SAM, then USMS policies shall control.

b. **Interim SAN Modification Authority** - During the term of this directive, the Director, office of Enforcement operations (OBO), Criminal Division, U.S. Department of Justice, may modify the inmate's SAM as long as any SAM modification authorized by OEO:

i. Does not create a more restrictive SAM;

ii. Is not in conflict with the request of the U.S. Attorney for the Eastern District of Virginia (USA/EDVA), Federal Bureau of Investigation (FBI), or USMS, or applicable regulations [outside of the then-applicable SAM memorandum]; and

iii. Is not objected to by the USA/EDVA, FBI, or USMS.

C. **Inmate Communications Prohibitions** - The inmate is limited, within USMS's reasonable efforts and existing confinement conditions, from having contact with other inmates and others (except as noted in this document) that could reasonably foreseeably result in the inmate's communicating information (sending or receiving) that could circumvent the SAM's intent of significantly limiting the inmate's ability to communicate (send or receive) terrorist information.

i. The inmate is prohibited from passing or receiving any written or recorded communications to or from any other inmate, visitor, attorney, or anyone else except as outlined and allowed by this

document.

d. **Use of interpreters/Translators** - Translator approval requirement:

i. USMS may use translators as necessary for the purpose of facilitating communication with the inmate.

ii. No person shall act as a translator without prior written clearance/approval from FBI, which shall only be granted after consultation with the FBI and USA/EDVA.

iii. Translators shall not be allowed to engage in, or overhear, unmonitored conversations with the inmate. Translators shall not be alone with the inmate, either in a room or on a telephone or other communications medium.

2. **Attorney/Client Provisions:**

a. **Attorney[1] Affirmation of Receipt** of the **SAM Restrictions Document** - The inmate's attorney (or counsel)--individually by each if more than one--must sign an affirmation acknowledging receipt of the SAM restrictions document. The Federal Government expects that the attorney, the attorney's staff, and anyone else at the behest of, or acting on behalf of, the attorney, will fully abide by the SAM outlined in this document; that expectation is set forth in the SAM restrictions document.

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[1] The term "attorney" refers to the inmate's attorney of record, who has been verified and documented by the USA/EDVA, and who has received and acknowledged receipt of the SAM restrictions document. As used in this document, "attorney" also refers to more than one attorney where the inmate is represented by two or more attorneys, and that the provisions of this document shall be fully applicable to each such attorney in his/her individual capacity.

NOTIFICATION OF SPECIAL ADMINISTRATIVE MEASURES
January 7, 2002

SPECIAL ADMINISTRATIVE MEASURES (SAM)
Pursuant to 28 C.F.R. § 501.3(c)
USMS Inmate - Zacarias Moussaoui ("Moussaoui" or "inmate")

i. The USA/EDVA shall present, or forward, the "attorney affirmation of receipt of the SAM restrictions document" to the inmate's attorney.

ii. After initiation of SAM and prior to the inmate's attorney being permitted to have attorney/client-privileged contact with the inmate, the inmate's attorney shall execute a document affirming the receipt of the SAM restrictions document *and* return the original to the USA/EDVA.

iii. The USA/EDVA shall maintain the original of the SAM acknowledgment document and forward a copy of the signed document to OEO in Washington, DC.

b. **Attorney Use of Interpreters/Translators -**

i. **Necessity Requirement** - No translator shall be utilized unless absolutely necessary where the inmate does not speak a common language with the attorney.

ii. **Attorney Immediate Presence Requirement** - Any use of a translator by the attorney shall be in the physical and immediate presence of the attorney--in the same room. The attorney shall not patch through telephone calls, or any other communication, to or *from* the inmate.

iii. **Translation of Inmate's Correspondence** - An attorney of record may only allow a federally-approved translator to translate the inmate's correspondence as necessary for attorney/client-privileged communication.

C. **Attorney/Client-Privileged Visits** - May only be noncontact: i.e., the attorney must be kept physically separate from the inmate.

d. **Defense Counsel May Disseminate Inmate Conversations** - The inmate's attorney may disseminate the contents of the inmate's communications to third parties for the sole purpose of preparing the inmate's defense--and not

for any other reason--on the understanding that any such dissemination shall be made solely by the inmate's counsel, and not by the counsel's staff.

e. **Unaccompanied Attorney's Precleared[2] Co-Counsel or Paralegal(s)[3] May Meet With Client** - The inmate's attorney's precleared co-counsel or paralegal(s) may meet with the client/inmate without *the* necessity of the inmate's attorney being present. An investigator or translator may not meet alone with the inmate. These meetings may only be noncontact.

f. **Precleared Translators May Accompany Attorney's Precleared Cc-Counsel or Paralegal(s)** - When necessary, a precleared translator may meet with the inmate in the presence of the inmate's attorney's precleared co-counsel or paralegal(s) without requiring the presence of the inmate's attorney. These meetings may only be noncontact.

g. **Simultaneous Multiple Legal Visitors** - The inmate may have multiple legal visitors provided that the multiple legal visitors consist of the inmate's attorney or precleared staff member. These meetings may only be noncontact.

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[2] "Precleared" when.used with regard to an attorney's staff, or "precleared staff member," refers to a co-counsel, paralegal, investigator, or a translator, who is actively assisting the inmate's attorney with the inmate"s defense, who has submitted to a background check by the FBI and USA/EDVA, who has successfully been cleared by the FBI and USA/EDVA, and who has received a copy of the inmate's SAM and has agreed--as evidenced by his/her signature-to adhere to the SAM *restrictions and* requirements. As used in this document, "staff member" also refers to more than one staff member, and the provisions of this document shall be fully applicable to each such staff member in his/her individual capacity.

[3] A "paralegal" will also be governed by any additional USMS rules and regulations concerning paralegals.

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SPECIAL ADMINISTRATIVE MEASURES (SAM)
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USMS Inmate - Zacarias Moussaoui ("Moussaoui" or "inmate")

h. **Legally-Privileged Telephone Calls** - The following rules refer to all legally-privileged telephone calls or communications:

i. **Defense Counsel's Precleared staff May Participate in Inmate Telephone Calls** - The inmate's attorney's precleared staff are permitted to communicate directly with the inmate by telephone.

ii. **Potential Defense Witness's Telephonic Communications With Imate** - Potential expert or fact witnesses may telephonically communicate with the inmate under the following conditions:

(1) The witness's identity is confirmed and his/her name is cleared by the FBI and the USA/EDVA.[4]

(2) The inmate's attorney (not just the attorney's staff) is present (in the same room as the witness) for and participating in the telephone call with the inmate.

(3) Any conversation that is not in the English language will be contemporaneously translated (by a precleared translator).

iii. **Inmate's Initiation of Legally-Privileged Telephone Calls** - Inmate-initiated telephone communications with his attorney or precleared staff are to be placed by a USMS staff member and the telephone handed over to the inmate only after the USMS staff member confirms that the person on the other end of the line is the inmate's attorney or precleared staff member. This privilege is

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[4] If an inmate's attorney does not wish to divulge a potential witness's identity to the prosecutors or their investigators, then the FBI and USA/EDVA shall create a "firewall" to accommodate the defense attorney's desire for secrecy while simultaneously allowing for the FBI to perform a background check and clearance on the proposed witness.

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contingent upon the following additional restrictions:

(1) The inmate's attorney will not allow any nonprecleared person to communicate with the inmate, or to take part in and/or listen to or overhear any communications with the inmate.

(2) The inmate's attorney must instruct his/her staff that:

(a) The inmate's attorney and precleared staff are the only persons allowed to engage in communications with the inmate.

(b) The attorney's staff (including the attorney) are not to patch through, forward, transmit, or send the inmate's communications through to third parties, except as specifically authorized by this document.

(3) No telephone call/communication, or portion thereof, except as specifically authorized by this document:

(a) Is to be overheard by a third party.[5]

(b) Will be patched through, or in any manner forwarded or transmitted to a third party.

(c) Shall be divulged in any manner to a third party.

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[5] For purposes of the SAM, "third party" does not include officials of the USMS, FBI, Immigration and Naturalization Service (INS), Department of Justice (DOJ), or others when made in connection with their official duties. This section does not allow monitoring of attorney/client privileged communications.

(d) Shall be in any manner recorded or preserved.[6] The inmate's attorney may make written notes of attorney/client-privileged communications.

(4) If USMS, FBI, or USA/EDVA determine that any call or portion of a call involving the inmate contains any indication of a discussion of illegal activity or actual or attempted circumvention of SAM, the inmate's telephone privileges may be negatively impacted.

(5) If FBI determines that the inmate has used or is using the opportunity to make a legal call to speak with another inmate, the inmate's ability to contact his attorney by telephone may be suspended or eliminated.

i. **Inmate's Attorney May Provide Documents to the Inmate** - The inmate's attorney may provide his/her client with the following additional items: discovery materials, court papers (including indictments, court orders, notions, etc.), materials determined by the inmate's counsel to be material to the preparation of the inmate's defense, and/or material prepared by the inmate's defense team and reviewed by the inmate's counsel, so long as any of the foregoing documents are translated by a precleared translator.

i. None of the materials provided may include inflammatory or materials inciting to violence or military training materials unless such materials have been pre-cleared by the USA/EDVA and the FBI.

ii. The USA/EDVA may authorize additional documents to be presented to the inmate. If any document not

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[6] Except by USMS, FBI, INS, DOJ, or other duly authorized federal authorities. This section does not allow monitoring of attorney/client privileged communications.

listed or described above needs to be transmitted to the inmate, consent for the transmission of the document can be obtained from the USA/EDVA without the need to formally seek approval for an amendment to the SAM.

j. **Inmate to Return Writing and Drawing Materials to Counsel** - The inmate's attorney, or the attorney's precleared staff, may provide the inmate with writing or drawing materials as long as the attorney, or his/her staff, retain such materials and the writings/drawings pertain to preparation of the inmate's defense and are only further disseminated by the attorney to third parties as reasonably necessary for purposes solely related to the preparation of the inmate's defense.

i. All such materials must be shown to the USMS staff before being provided to the inmate.

ii. None of the materials provided may include pens, pencils, or other instruments which can be used to harm others.

k. **Legal Mail** - The inmate's attorney may not send, communicate, distribute, or divulge the inmate's mail, or any portion of its contents (legal or otherwise), to third parties.

i. In signing the SAM acknowledgment document, the inmate's attorney, and precleared staff, will acknowledge the restriction that only inmate case-related documents will be presented to the inmate, and that the attorney will not forward third-party mail that the inmate may present to the attorney.

3. **Inmate's Consular Contacts** - The inmate is a citizen of France. The inmate shall be allowed Consular communications and visits. The Consular contacts shall comply with the U.S. Department of State Consular notification and access

requirements.[7]

4. Inmate's (Nonlegal) Contacts:

a. **(Nonlegal) Telephone Contacts -**

i. **Telephone Call Limits -**

(1) The inmate is limited to nonlegal telephone calls only to/from his immediate family members.[8]

(2) The quantity and duration of the inmate's nonlegal telephone calls with his immediate family members shall be set by USMS and FBI.

ii. **Rules--Telephone Calls** - The following rules refer to all nonlegally-privileged and nonconsular-privileged telephone calls or communications:

(1) No telephone call/communication, or portion thereof,

(a) Is to be overheard by a third party.

(b) Is to be patched through, or in any manner forwarded or transmitted, to a third party.

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[7] See, Consular Notification and Access, Instructions for Federal, State, and Local-Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, U.S. Department of State (DOS). DOS contact: Ms. Kathleen A. Wilson, Attorney-Advisor, Office of the Assistant Legal Advisor for Consular Affairs, DOS, telephone (202) 647-0816.

[8] The inmate's "immediate family members" are defined as the inmate's (USMS/FBI-verifiable) spouse, natural children, parents, and siblings.

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(c) Shall be divulged in any manner to a third party.

(d) Shall be in any manner recorded or preserved.[9]

iii. **Telephone SAX Restriction Notifications** - For all nonlegal and nonconsular telephone calls to the inmate's immediate family member(s):

(1) USMS shall inform the innate of the telephone SAM restrictions prior to each telephone call.

(2) USMS shall verbally inform the inmate's immediate family member(s) on the opposite end of the inmate's telephone communication of the telephone SAM. USMS is only required to notify the inmate's communication recipient in English.

(3) USMS shall document each such telephone SAM notification.

iv. **Family call monitoring** -

(1) A call with the innate's immediate family member(s) shall be:

(a) Contemporaneously monitored (as directed by the FBI).

(b) Contemporaneously recorded (as directed by the FBI) in a manner that allows such telephone call to be analyzed for indications the call is being used to pass messages soliciting or encouraging acts of violence or other crimes, or to otherwise attempt to circumvent the SAM.

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[9] Except by USMS, FBI, INS, DOJ, or other duly authorized federal authorities. This section does not allow monitoring of attorney/client or consular privileged communications.

(2) Each inmate/immediate family member telephone call shall be provided by USMS on a single, individual, cassette tape (per call) for forwarding to the *FBI*. These recordings shall be forwarded to the FBI (as directed by the FBI) on a call-by-call basis as soon as practicable after each call. it is anticipated that there will-be a very low volume of calls. Accordingly, call-by-call forwarding of the tape cassettes to the FBI should not be burdensome.

v. **Improper Communications** - If telephone call monitoring or analysis reveals that any call or portion of a call involving the inmate contains any indication of a discussion of illegal activity, the soliciting or encouraging of acts of violence or terrorism, or actual or attempted circumvention of SAM, the inmate shall be permitted no further calls to his immediate family members for a time period to be determined by USMS. If contemporaneous monitoring reveals such inappropriate activity, the telephone call shall be immediately terminated.

b. **(Nonlegal/Nonconsular) Visits -**

i. Limited visitors - The inmate shall be permitted to visit only with his immediate family members.

ii. English Requirement - All (other than attorney/client-privileged) communications during inmate visits will be in the English language unless a fluent FBI/USMS-approved translator is readily available to contemporaneously monitor the communication/visit.

iii. **Visit criteria** - All nonlegal/nonconsular visits will be:

(1) Permitted only after USMS/FBI confirms the proposed visitor's identity and immediate family member relationship to the inmate.

(2) closely monitored by USMS/FBI.

(3) Permitted only with a minimum of 14 calendar days advance written notice to the USMS facility where the inmate is housed.

(4) Without any physical contact. All such meetings shall be noncontact to protect against harm to visitors or staff should the inmate attempt to take hostages.

(5) Limited to one visitor at a time.

C. **(Noulegal/Nonconsular) Mail** - Any mail not clearly and properly addressed to/from the inmate's attorney and marked privileged, or consular mail (incoming or outgoing):

i. **Copied** - Shall be copied (including the surface of the envelope) by the warden, or his/her designee, of the facility in which the inmate is housed.

ii. **Forwarded** - Shall be forwarded, in copy form, to the location designated by the FBI.

iii. **Analyzed** -

(1) After government analysis and approval, the inmate's outgoing nonlegal mail will be forwarded to the inmate's attorney for ultimate dispersal.

(2) The Federal Government will forward the inmate's non-legal mail to the inmate's attorney after a review and analysis period not to exceed:

(a) Five (5) business days for mail which is written entirely in the English language.

(b) Ten (10) business days for any mail which includes writing in any language

other than English, to allow for translation.

(c) Thirty (30) business days for any mail where the Federal Government has reasonable suspicion to believe that a code was used, to allow for decoding.

iv. **Mail Seizure** - if outgoing/incoming mail is determined by USMS or FBI to contain overt or covert discussions of or requests for illegal activities, the soliciting or encouraging of acts of violence or terrorism, or actual or attempted circumvention of SAM, the mail shall not be delivered/forwarded. The inmate shall be notified in writing of the seizure of any mail.

5. **Communication With News media:**

a. The inmate will not be permitted to talk with, meet with, correspond with, or otherwise communicate with any member, or representative, of the news media, in person, by telephone, by furnishing a recorded message, through the mail, through his attorney, through a third party, or otherwise.

6. **No Group Recreation, Group Prayer:**

a. The inmate shall not be allowed to recreate with other inmates.

b. The inmate shall not be allowed to engage in group prayer with other inmates.

C. If an approved imam (or other religious representative) hired by the USMS is to be present for prayer with the inmate, the prayer shall be conducted as part of a noncontact visit to prevent the imam from being harmed or taken hostage.

7. **No Communal Cells; No Communication Between Cells:**

a. The inmate shall not be allowed to share a cell with another inmate.

b. The inmate shall not be allowed to communicate with any other inmate by making statements audible to other inmates or by sending notes to other inmates.

a. **Recordings Conversations Between Cells:**

a. USMS and the FBI are hereby authorized to place microphones *in* the hallways and elsewhere outside the inmate's cell to record any statements made by the inmate to other inmates or staff.

b. Any recordings generated under this section shall ONLY be reviewed by a firewall team of agents, officials, and attorneys.

c. Any recordings generated under this section shall not be disseminated to agents or prosecutors involved in the conduct of the prosecution of the inmate absent the prior specific written approval of the Attorney General, the Deputy Attorney General or their delegate.

d. In conducting any such recordings, care shall be taken so as not to conduct recording so as to overhear any meeting between the inmate and his counsel.

e. The Notice of SAM given to the inmate shall notify the inmate that he is subject to such recording.

9. **Cellblock Procedures:**

a. The inmate shall be kept separated from other inmates as much as possible while in the cellblock area.

b. The inmate shall not be allowed to communicate with any other inmate while in the cellblock area.

10. **Commissary Privileges:**

a. The inmate shall not be allowed to obtain or keep items of commissary except those necessary for health and sanitation. Specifically, the inmate shall not be allowed to obtain or retain: combs; condiments or spices of any kind; batteries; pens or pencils (other

than safety pens--a writing instrument that because of its configuration is difficult to convert into, or to use as, a weapon) or any other objects determined by USMS to be capable of being converted into dangerous instruments.

b. The inmate shall not be given hot tea, hot coffee, boiling water, or any other liquid at a temperature that can be used to harm other persons nor shall the inmate be given any container in which to store liquids.

c. The inmate shall be given access to razor blades for shaving under strictly controlled circumstances. The inmate shall request a razor blade only when the inmate intends to shave and only during the hours specified by the Warden.

11. **Frequent Cell Searches:**

a. USMS is hereby directed to search the inmate's cell frequently and to take appropriate disciplinary action (including the suspension of telephone privileges) for any infractions.

CONCLUSION

The SAM set forth herein, especially as it relates to attorney/client-privileged communications and family contact, is reasonably necessary to prevent the inmate from committing, soliciting, or conspiring to commit additional criminal activity. moreover, these measures are the least restrictive that can be tolerated in light of the ability of this inmate to aid and abet violence-related crimes, and are also designed to preclude his complicity, either knowingly or inadvertently, in plans that create a substantial risk that the inmate's communications or contacts with persons could result in death or serious bodily injury to persons.

With respect to telephone privileges, the SAM is reasonably necessary because of the frequent calls to co-conspirators to arrange violent activities.

The SAM, with respect to mail privileges, is reasonably

necessary to prevent the inmate from passing along critically-timed messages. While I recognize that eliminating the inmate's mail privileges entirely may be an excessive measure except in the most egregious of circumstances, I believe that delaying mail departure and permitting the warden and other authorized personnel, to examine a copy of the mail is sufficient at this time to adequately interrupt any communication patterns the inmate may develop with the outside world, and to ensure that the mail is not used to deliver requests for, or assist in, violent activities. Under this procedure, the inmate can relate personal news to family members, even if delayed, but he may find it difficult or unwise to pass along restricted information in light of these procedures.

To the extent that the use of a translator is necessary, the government has the right to make sure that the translator given access to the inmate is worthy of trust.

Finally, the SAM's prohibition of contact with the media is reasonably necessary. Communication with the media could pose a substantial risk to public-safety if the inmate advocates violent offenses, or if he makes statements designed to incite such acts. Based upon the inmate's past behavior, I believe that it would be unwise to wait until after the inmate solicits or arranges another violent act to justify such media restrictions.

SAM CONTACT INFORMATION

Any questions that you or your staff may have about this memorandum or the SAM directed herein should be directed to Michael A. Brave, Chief, Intelligence and Investigative Operations Unit, Office of Enforcement Operations, Criminal Division, U.S. Department of Justice. He can be contacted at U.S. Department of Justice, 10th & Constitution Avenue, NW, Criminal Division, OEO, Intelligence & Investigative Operations Unit, JCK Building, Room 1109, Washington, DC 20530-0001; telephone - (202) 514-3684; 4nd facsimile - (202) 514-3120.

EXHIBIT B

UNITED STATES OF AMERICA, - v. - USAMA BIN LADEN, a/k/a "Usamah Bin-Muhammad Bin-Ladin," a/k/a "Shaykh Usamah Bin-Ladin," a/k/a "Abu Abdullah," a/k/a "Mujahid Shaykh," a/k/a "Hajj," a/k/a "Abdul Hay," a/k/a "al Qaqa," a/k/a "the Director," a/k/a "the Supervisor," a/k/a "the Contractor," MUHAMMAD ATEF, a/k/a "Abu Hafs," a/k/a "Abu Hafs el Masry," a/k/a "Abu Hafs el Masry el Khabir," a/k/a "Taysir," a/k/a "Sheikh Taysir Abdullah," a/k/a "Abu Fatimah," a/k/a "Abu Khadija," AYMAN AL ZAWAHIRI, a/k/a "Abdel Muaz," a/k/a "Dr. Ayman al Zawahiri," a/k/a "the Doctor," a/k/a "Nur," a/k/a "Ustaz," a/k/a "Abu Mohammed," a/k/a "Abu Mohammed Nur al-Deen," MAMDOUH MAHMUD SALIM, a/k/a "Abu Hajer al Iraqi," a/k/a "Abu Hajer," KHALED AL FAWWAZ, a/k/a "Khaled Abdul Rahman Hamad al Fawwaz," a/k/a "Abu Omar," a/k/a "Hamad," ALI MOHAMED, a/k/a "Ali Abdelseoud Mohamed," a/k/a "Abu Omar," a/k/a "Omar," a/k/a "Haydara," a/k/a "Taymour Ali Nasser," a/k/a "Ahmed Bahaa Eldin Mohamed Adam," WADIH EL HAGE, a/k/a "Abdus Sabbur," a/k/a "Abd al Sabbur," a/k/a "Wadia," a/k/a "Abu Abdullah al Lubnani," a/k/a "Norman," a/k/a "Wa'da Norman," a/k/a "the Manager," a/k/a "Tanzanite," IBRAHIM EIDAROUS, a/k/a "Ibrahim Hussein Abdelhadi Eidarous," a/k/a "Daoud," a/k/a "Abu Abdullah," a/k/a "Ibrahim," ADEL ABDEL BARY, a/k/a "Adel Mohammed Abdul Almagid Abdel Bary," a/k/a "Abbas," a/k/a "Abu Dia," a/k/a "Adel," FAZUL ABDULLAH MOHAMMED, a/k/a "Harun," a/k/a "Harun Fazhl," a/k/a "Fazhl Abdullah," a/k/a "Fazhl Khan," MOHAMED SADEEK ODEH, a/k/a "Abu Moath," a/k/a "Noureldine," a/k/a "Marwan," a/k/a "Hydar," a/k/a "Abdullbast Awadah," a/k/a "Abdulbasit Awadh Mbarak Assayid," MOHAMED RASHED DAOUD AL-'OWHALI, a/k/a "Khalid Salim Saleh Bin Rashed," a/k/a "Moath," a/k/a "Abdul Jabbar Ali Abdel-Latif," MUSTAFA MOHAMED FADHIL, a/k/a "Mustafa Ali Elbishy," a/k/a "Hussein," a/k/a "Hussein Ali," a/k/a "Khalid," a/k/a "Abu Jihad," KHALFAN KHAMIS MOHAMED, a/k/a "Khalfan Khamis," AHMED KHALFAN GHAILANI, a/k/a "Fupi," a/k/a "Abubakary Khalfan Ahmed Ghailani," a/k/a "Abubakar Khalfan Ahmed," FAHID MOHAMMED ALLY MSALAM, a/k/a "Fahad M. Ally," SHEIKH AHMED SALIM SWEDAN, a/k/a "Sheikh Bahamadi," a/k/a "Ahmed Ally," Defendants.

S(7) 98 Cr. 1023 (LBS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 719

January 25, 2001, Decided
January 25, 2001, Filed

DISPOSITION: [*1] Defendant's motion to declare CIPA unconstitutional as applied to him denied.

CORE TERMS: classified information, disclosure, defense counsel, pretrial, disclose, discovery, cross-examination, relevance, Sixth Amendment, protective order, national security, ex parte, designation, notice, Fifth Amendment, preparation, classified, right to remain silent, classified material, brief description, right to testify, in camera, admissibility, impermissibly, materiality, one-sided, graymail, redacted, confer, remain silent

COUNSEL: PAUL W. BUTLER, PATRICK J. FITZGERALD, KENNETH M. KARAS, MICHAEL J. GARCIA, Assistant United States Attorneys, MARY JO WHITE, United States Attorney for the Southern District of New York, New York, New York.

For El-Hage, Defendant: SAM A. SCHMIDT, JOSHUA L. DRATEL, KRISTIAN K. LARSEN, New York, New York.

For Al-'Owhali, Defendant: FREDERICK H. COHN, LAURA GASIOROWSKI, DAVID PRESTON BAUGH, New York, New York.

For Khamis Mohamed, Defendant: JEREMY SCHNEIDER, DAVID STERN, DAVID RUHNKE, New York, New York.

For Odeh, Defendant: ANTHONY L. RICCO, EDWARD D. WILFORD, CARL J. HERMAN, SANDRA A. BABCOCK, New York, New York.

JUDGES: HON. LEONARD B. SAND, U.S.D.J.

OPINIONBY: LEONARD B. SAND

OPINION: MEMORANDUM AND ORDER n1

n1 This classified Memorandum and Order is being filed under seal and will remain under seal until January 18, 2001 unless the Court is advised in writing on or before that date that some portion or all of the Memorandum and Order should remain under seal. The Government is hereby directed to institute proceedings to declassify this Memorandum and Order.

[*2]

SAND, District Judge.

Presently before the Court is Defendant El-Hage's motion to declare the Classified Information Procedures Act ("CIPA"), *18 U.S.C. app. 3* (1980), unconstitutional as applied in this case. Defendants Mamdouh Mahmud Salim and Mohammed Sadeek Odeh join this motion. n2 (Dratel Decl. P 3.) For the reasons set forth below, this motion is denied.

n2 The El-Hage Motion also seeks additional discovery and the Court is uncertain at this time which, if any, of the requests have been consensually resolved or are moot. Counsel for El-Hage is to advise the Court of any discovery requests relating to CIPA which he still wishes to pursue.

ANALYSIS

The Defendant asserts that CIPA is unconstitutional because its application in this case infringes his Sixth and Fifth Amendment rights. More specifically, as a Sixth Amendment matter, he claims that he is being deprived of: (1) the effective assistance of his counsel; (2) the right to confront witnesses; (3) the opportunity to [*3] be present at critical proceedings; and (4) the ability to assist in the preparation and presentation of his defense. Under the Fifth Amendment, he argues that he is being denied the following rights: (1) to testify in his own behalf; (2) to present a defense; and (3) to remain silent. These allegations will be evaluated in turn.

I. Background

CIPA was enacted by Congress in 1980 to address the issues which accompany criminal prosecutions involving national security secrets. In particular, the Act was a response to the problem of "graymail" which arose in prosecuting espionage and criminal leak cases. S.Rep. No. 96-823, 96th Cong., 2d Sess. (1980). A defendant is said to "graymail" the government when he threatens to disclose classified information during a trial and the government is forced to choose between tolerating such disclosure or dismissing the prosecution altogether. See *United States v. Pappas, 94 F.3d 795 (2d Cir. 1996)* (discussing "graymail" and CIPA's legislative history); *United States v. Poindexter, 725 F. Supp. 13, 31 (D.D.C. 1989)* (same). In CIPA, Congress established procedures whereby a trial court evaluates before trial [*4] the admissibility of the classified information which is at issue.

CIPA mandates that a defendant who "reasonably expects to disclose" classified information must notify the government and the court in advance of trial and must provide a "brief description" of the information. *18 U.S.C. app. 3* § 5. If the defendant fails to provide this notice, the court can preclude the disclosure of the classified information. Id. In addition, CIPA provides that, upon the request of the United States, the court "shall conduct" a hearing (usually in camera) before the start of the trial to "make all determinations concerning the use, relevance, or

admissibility of classified information." *18 U.S.C. app. 3* § 6(a). Section 6(c) provides that the United States shall be given the opportunity, before the court authorizes the release of classified information, to propose the substitution of either a summary of the classified information or a stipulation of the facts sought to be proved by the defendant. If the court denies the government's proposed substitutions, the Attorney General may submit a formal objection to disclosure of the information, at which time [*5] the court will forbid the defendant to disclose the information and impose appropriate sanctions on the government (including, in some cases, dismissal of the indictment or selected counts thereof). *18 U.S.C. app. 3* § 6(e). Finally, Section 6(f) provides that if it determines that classified information may be revealed at trial, the court shall "unless the interests of fairness do not so require" order the government to disclose any classified information that it intends to use to rebut the defendant's proffer.

The Court, in a Protective Order dated July 29, 1999 established at P 5 that "no defendant . . . shall have access to any classified information involved in this case unless that person shall first have: (a) received the necessary security clearance . . ." The Court adopted the Protective Order because of the serious risk that unauthorized disclosure of classified information would jeopardize the ongoing Government investigation into the activities of alleged associates of the Defendants. *United States v. Bin Laden, 58 F. Supp. 2d 113, 121-22 (S.D.N.Y. 1999)*. The practical result of that order is that defense counsel have been cleared to [*6] review a category of classified documents that they may not share with their clients. (None of the defendants in the case have security clearance.)

The Government provides a long list of the cases which have uniformly upheld the constitutionality of CIPA's procedural framework. (Resp. at 7-8.) However, the Defendant aptly highlights (El-Hage Mot. at 2), and the Government concedes (Resp. at 9-10) that the situation presented here is different from the usual CIPA case. The legislative history of the Act suggests that CIPA was primarily drafted to manage the disclosure of classified information in cases where the defendant was previously in possession of classified information. S.Rep. No. 96-823, 96th Cong., 2d Sess. (1980). Not surprisingly, given this history, the majority of cases employing CIPA procedures have involved those circumstances. See e.g., *Poindexter, 725 F. Supp. 13; United States v. Lee, 90 F. Supp. 2d 1324 (D.N.M. 2000); United States v. North, 708 F. Supp. 389 (D.D.C. 1988); United States v. Collins, 720 F.2d 1195 (11th Cir. 1983)*. But see *United States v. Rezaq, 156 F.R.D. 514, 525 (D.D.C. 1994),* [*7] vacated in part on other grounds *United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995)* (upholding a CIPA-based protective order which withheld classified information from defendant because he was an alleged terrorist and was accused of committing deliberate political crimes against the United States).

The Government claims that this difference -- the fact that the Defendants have had "no prior access to the classified information" -- necessitates that the Court continue to prohibit the disclosure of the classified information to the Defendants. (Resp. at 13.) In addition to its concern that the Defendants "present an ongoing threat to national security," the Government asserts that disclosure to the Defendants of classified information could have a deleterious effect on cooperative law enforcement and intelligence relationships with foreign governments. (Resp. at 12-13.) The Government argues that these concerns justify withholding information that poses a threat to national security from the Defendants.

II. The Defendant's Sixth Amendment Claims

A. The Right to Counsel

The Defendant claims that the nondisclosure provisions of the Protective [*8] Order prevent him from consulting with his attorneys to assist in identifying evidence which is relevant, exculpatory or which may serve to impeach a government witness. (El-Hage Mot. at 8.) The Defendant's attorneys explain that because of "the length of the alleged conspiracies, their geographical scope, the language barriers, the myriad names (some very similar) and aliases, and the cultural and ethnic diversity involved," they are severely handicapped by not being able to consult with their client. (Id. at 11.) It is the Defendant's view that the restrictions effect an unconstitutional deprivation of counsel because he cannot consult with his attorney about a "substantial amount of discovery." n3 (Id. at 7.)

> n3 The Government claims that because of its "continuing effort to declassify" discovery materials, "the classified discovery in this case is no longer overwhelmingly voluminous." (Resp. at 2.)

The Supreme Court has established that restrictions on communication between a defendant and his attorney [*9] should only be imposed in limited circumstances and should be no more restrictive than necessary to protect the countervailing interests at stake. *Geders v. United States, 425 U.S. 80, 89-91, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976)* (holding that defendant was unconstitutionally denied the effective assistance of counsel when he was ordered by the trial judge not to confer with counsel about anything during 17 hour recess between defendant's direct and cross-examination). Cf. *Perry v. Leeke, 488 U.S. 272, 284-85, 102 L. Ed. 2d 624, 109 S. Ct. 594 (1989)* (explaining that in situation similar to Geders but where the recess was only for 15 minutes, judge did not violate defendant's rights by forbidding him to confer with counsel).

The Second Circuit has applied these precedents to circumstances similar to those presented in this case. See *Morgan v. Bennett, 204 F.3d 360, 367 (2d Cir. 2000)* (characterizing Geders and Perry as supporting the view that when there is an important need to protect a countervailing interest "a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible"). In [*10] Morgan, the defendant and persons associated with him had allegedly threatened a witness and the court ordered the defendant's attorney not to apprise his client of the fact that the witness would be testifying the following day. *Id. at 363*. The Morgan court justified this "gag order" by relying on analogous safety-based limitations which had been approved in other cases. *Id. at 367* (citing to *Roviaro v. United States, 353 U.S. 53, 59-62, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957)* (allowing an informant's identity to be withheld from the defendant); *Smith v. Illinois, 390 U.S. 129, 131, 19 L. Ed. 2d 956, 88 S. Ct. 748 (1968)* (permitting the government to withhold witnesses' addresses); *United States v. Thai, 29 F.3d 785, 800-01 (2d Cir. 1994)* (allowing jury to be anonymous)). Morgan should not be read too broadly, however. The Second Circuit specifically noted that the "gag order" did not "seem likely" to impair the defense counsel's preparation and highlighted that it did not appear that other restrictions would have been sufficient. *204 F.3d at 368*.

In a similar case decided prior to Morgan, [*11] the Second Circuit held that a district court's order (during trial) to the defendant's attorney not to reveal to the defendant that he (the defendant) was the subject of a jury-tampering and perjury investigation was not an unconstitutional infringement of the defendant's right to counsel. *United States v. Padilla, 203 F.3d 156, 158 (2d Cir. 2000)*. As in Morgan, the Padilla court highlighted that the restrictions imposed by the district court were "drawn as narrowly as possible" and "did not implicate counsel's representation regarding the crimes charged." *Id. at 160*.

In other circuits, similar restrictions have been upheld. See *United States v. Herrero, 893 F.2d 1512 (7th Cir. 1990)* (finding no infringement of the defendant's right to effective assistance of counsel where the court ordered that defense counsel not reveal the name of the confidential informant to the defendant); *United States v. Truong Dinh Hung, 667 F.2d 1105, 1107 (4th Cir. 1981)* (finding no denial of the Sixth Amendment right to counsel where defense counsel (but not defendants) were permitted to examine documents to assist the court [*12] in making Jencks Act determinations); *United States v. Pelton, 578 F.2d 701 (8th Cir. 1978)* (upholding district court's ruling withholding from the defendant tape recordings of her voice in order to protect the identity of cooperating witnesses); *United States v. Anderson, 509 F.2d 724, 730 (9th Cir. 1974)* (permitting access to in camera hearing to defense counsel but not to defendant); *United States v. Singh, 922 F.2d 1169, 1172-73 (5th Cir. 1991)* (same).

It is clear that, usually, a defendant is permitted to review items which have been produced in discovery. See *Truong, 667 F.2d at 1108*. The Court must weigh the interest of the Government in non-disclosure against this presumption. See *Morgan, 204 F.3d at 365* ("The court may not properly restrict the attorney's ability to advise the defendant unless the defendant's right to receive such advice is outweighed by some other important interest."). In other contexts, courts have given similar government interests significant weight in the balancing process. See *United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985)* (explaining [*13] that the government has a "substantial interest in protecting sensitive sources and methods of gathering information"); *Rezaq, 156 F.R.D. at 525* (finding that "the need to protect sensitive information clearly outweighs defendant's need to know all of that information personally when his knowledge of it will not contribute to his effective defense"). Cf. *United State v. Yunis, 276 U.S. App. D.C. 1, 867 F.2d 617, 623 (D.C. Cir. 1989)* (holding that government's interest in protecting details about means of intercepting communications outweighed defendant's right to disclosure).

Although the El-Hage's attorneys claim that their task in discerning the relevance and materiality of the classified information is made more difficult by their inability to confer with the Defendant, few harms are specifically identified by defense counsel. El-Hage's counsel raise specific concerns about the contents of the [redacted] and three facsimiles allegedly sent by the Defendant. (El-Hage Mot. at 9.) The latter have now been declassified. (Resp. at 4.) With respect to the former, the Defendant acknowledges that the Government has indicated that it does not plan to [*14] use the [redacted] at trial and does not seem to suggest any intention to use the evidence as part of the defense case. (*Id. at 9 n.3.)* If this situation changes, the Court will revisit the question of the need for disclosure of the list to the Defendant. In addition, counsel assert that the defendants "may very well" be in a better position to designate classified material to use in cross-examining [redacted] (if he is to be a government witness). (El-Hage Mot. at 10.) There is no further explanation of why the Defendant might be have a better understanding of the classified information. The harm to the defendant by that characterization is speculative at best.

Obviously, the Court encourages the Government to continue to prioritize the declassification (through redaction and editing, if necessary) of classified discovery. As appropriate, during a Section 6 hearing (assuming that one is to be scheduled n4), the Court will, in determining the relevance and materiality of classified information, bear in mind that defense counsel have not been able to consult with the Defendant to the extent they would have preferred.

At the end of the analysis, however, given the [*15] Government's compelling interest in restricting the flow of classified information and in light of the weight of precedent endorsing similar restrictions, the Court rejects the Defendant's claim of an unconstitutional deprivation of counsel. While the Defendant suggests that disclosure might enable him to assist counsel in making decisions about his representation, this hypothetical benefit is insufficient to warrant a finding that the application of CIPA in this case is unconstitutional.

n4 The Court has, on numerous occasions, indicated its availability for a Section 6 hearing. The parties have yet to schedule such a hearing.

B. The Right to Confront Witnesses and Evidence

El-Hage asserts that the Sixth Amendment not only gives him the right to cross-examine witnesses who testify against him, but also that it affords him "the opportunity for effective cross-examination." (El-Hage Mot. at 13 (citing to *Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986).)* [*16] He argues that the prohibition on disclosure of classified information means that his ability to confront the evidence against him will be impermissibly undercut. In particular, El-Hage's attorneys explain that, at the Section 5 designation stage, the relevance of certain classified material "will likely elude counsel," but that the Defendant might be in a superior position to recognize the potential value of classified information. (El-Hage Mot. at 14.) For the reasons outlined in the previous section, the Court finds that defense counsel merely speculate about the harms that may be suffered by the Defendant. The suggestion that the Defendant "might" contribute to the predominantly legal process of designating relevant evidence is not sufficient to warrant a finding that CIPA is being applied to deprive the Defendant of his constitutional right to confront witnesses. See infra Section II.C. (discussing defendant's right to be present at pretrial hearings concerning the resolution of legal questions).

The Defendant also asserts that Sections 5(a) and 6 impermissibly require that the Defendant "preview" his cross-examination to the Government. (El-Hage Mot. at 15.) According to [*17] El-Hage, such a preview would "most certainly result in 'significant diminution' of the effectiveness of that cross-examination." (Id. (citing to *United States v. Poindexter, 698 F. Supp. 316, 320-21 (D.D.C. 1988)).)* The Defendant notes that the Government is subjected to no such disclosure requirement.

The Government correctly notes that "each court considering these arguments in the CIPA context has rejected them." (Resp. at 18-19.) See *Lee, 90 F. Supp. 2d at 1328* (upholding the constitutionality of CIPA and explaining that "the Confrontation Clause does not guarantee the right to undiminished surprise with respect to cross-examination of prosecutorial witnesses"); *Poindexter, 725 F. Supp. at 34-35* (same); *United States v. Ivy, 1993 U.S. Dist. LEXIS 13572, *21, 1993 WL 316215, *7* (E.D.Pa.) ("CIPA does not . . . deprive Ivy of the opportunity to confront and question the government's witnesses at trial."). These cases emphasize that CIPA does not require that a defendant reveal his or her trial strategy, but only mandates that the defendant identify whatever classified information he plans to use. See *Lee, 90 F. Supp. 2d at 1328; Ivy, 1993 WL 316215,* [*18] *8; *United States v. Wilson, 571 F. Supp. 1422, 1427 (S.D.N.Y. 1983)* (explaining that the statute requires only a "'brief description of the classified information'" to be used).

In addition, despite the Defendant's assertion to the contrary, numerous courts have held that CIPA's burdens are not one-sided. See *United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983)* (reviewing government's disclosure obligations under CIPA); *Poindexter, 725 F. Supp. at 32* (rejecting claim that CIPA's burdens are one-sided); Ivy, 1993 316215 at *5 (characterizing CIPA's burdens as "carefully balanced" between the government and the defendant). Thus, the Court rejects the Defendant's attempt to analogize his burdens under CIPA to the situation presented in *Wardius v. Oregon, 412 U.S. 470, 37 L. Ed. 2d 82, 93 S. Ct. 2208 (1973).*

The Defendant requests that the Court permit him to submit his "rationale for the projected use of designated classified material" to the Court ex parte as was done in Poindexter. (Reply at 14.) See *United States v. Poindexter, 698 F. Supp. 316, 320 (D.D.C. 1988)* (permitting an [*19] exparte submission in order to prevent the defendant from having to disclose his trial strategy to the government). The Government argues that an ex parte submission by the defendants in this case would be inappropriate because it would "clearly frustrate CIPA's purpose in identifying for the Government the national security 'cost' of going forward with particular charges against particular defendants." n5 (Response at 20 n. 8.) The Court does not accept this proposition. The Government will be provided with the Section 5 notice which shall, in providing the "brief description" required by the statute, meet the standard for specificity set forth in *United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983))*. The Court will then permit the Defendant to submit his explanation of the proposed use of the information ex parte. See *Poindexter, 698 F. Supp. at 320* (explaining that the framers of CIPA "expected the trial judge 'to fashion creative and fair solutions' for classified information problems").

n5 The Government suggests that the highly unusual

circumstances underlying the Poindexter decision make it a poor analog to the instant case. (Resp. at 20 n.8.) While the situation in Poindexter was significantly different, the general principles articulated by the court are applicable. See *Poindexter, 698 F. Supp. at 320* ("In any case involving classified information the defendant should not stand in a worse position because of such information than he would have if there were no such statutory procedures.").

[*20]

C. Right to be Present at Critical Proceedings

The Defendant asserts that he has a Sixth Amendment right to be present at a CIPA Section 6 hearing (and during the Section 5 designation process) because these are critical proceedings or critical stages of the trial. n6 (El-Hage Mot. at 17-18.) See *Snyder v. Massachusetts, 291 U.S. 97, 105-06, 78 L. Ed. 674, 54 S. Ct. 330 (1934)* ("In a prosecution for a felony the defendant has the privilege . . . to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."). The test established by the Supreme Court for determining whether the defendant's absence from a pretrial proceeding is violative of the Sixth Amendment, in particular the Confrontation Clause, is whether the defendant's exclusion "interferes with his opportunity for effective cross-examination." *Kentucky v. Stincer, 482 U.S. 730, 740, 96 L. Ed. 2d 631, 107 S. Ct. 2658 (1987)* (upholding the defendant's exclusion from a competency hearing (that his attorney attended)). See also *Padilla, 203 F.3d at 160* (finding that defendant's [*21] exclusion from a pretrial proceeding was constitutional); *United States v. Bell, 464 F.2d 667, 670 (2d Cir. 1972)* (excluding the defendant during an airline ticket agent's description of the "air hijacker profile"). In all three cases, the courts emphasized that the subject matter of the pretrial proceedings was not directly related to the subject matter of the trial. See *Stincer, 482 U.S. at 741; Padilla, 203 F.3d at 160; Bell, 464 F.2d at 671.* Relying on these cases, the Defendant argues that he should not be excluded from a Section 6 hearing (or from the Section 5 designation process) because he could contribute to his counsel's understanding of the materials being reviewed. (El-Hage Mot. at 17-18.)

n6 Because the parties have yet to request a Section 6 hearing, this issue may be moot.

According to the Government, the Section 6 hearing, which will determine the relevance and admissibility of certain classified information, will address questions [*22] of law and not questions of fact and, therefore, does not require the Defendant's presence. (Resp. at 21 (citing Fed. R. Crim. P. 43(c)(3) ("A defendant need not be present . . . when the proceeding involves only a conference or hearing upon a question of law.")).) The Ninth Circuit has ruled that the questions resolved during a CIPA hearing regarding the protection of classified information are questions of law which may be resolved outside the presence of the defendant. *United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261-62 (9th Cir. 1998).* See also *United States v. Cardoen, 898 F. Supp. 1563, 1571-72 (S.D. Fl. 1994)* (holding that court rulings at a Section 6 hearing are not "factual questions that are relevant to the determination of guilt or innocence"). Cf. *United States v. Singh, 922 F.2d 1169, 1172-73 (5th Cir. 1991)* (finding that in camera hearing to ascertain whether to disclose the identity of a confidential informant involved resolution of the legal question of the materiality of her testimony and concluding that exclusion of defendant from the hearing (which his attorney was permitted to attend) did not qualify as [*23] a breach of the Confrontation Clause). The Court adopts these precedents and holds that the Defendant's exclusion from the hearing, should one be held, is not unconstitutional.

D. The Right to Assist in the Preparation and Presentation of his Defense

Based on the above outlined arguments and in reliance on *Faretta v. California, 422 U.S. 806, 819, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975),* El-Hage argues that he has a personal right to make his defense. According to the Defendant, he is being "deprived of his right to assist in the preparation and presentation of his defense if he is barred from participating in the Section 5 designation process, as well as from being present at and participating in subsequent CIPA proceedings." (El-Hage Mot. at 20.)

The Defendant is correct that Faretta speaks, at length, about the right "to make one's own defense personally." *422 U.S. at 819* ("It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"). These characterizations, [*24] however, are offered by the Supreme Court in the context of a defendant who sought to represent himself. See id. Faretta's protection of the right of the accused to represent himself does not extend to the holding that the Defendant suggests. The Faretta Court specifically acknowledges that the protections afforded the defendant are different when he or she has acquiesced to an attorney's representation. *Id. at 820-21.* Because the Court has already established that the limited restrictions on communication between the Defendant and his attorney are justified, this assertion is rejected.

III. The Defendant's Fifth Amendment Claims

A. The Right to Testify

The defendant claims that he will "effectively" be denied his Fifth Amendment right to testify in this case because his attorneys will be unable to prepare him adequately for both his direct testimony and the Government's cross examination. (El-Hage Mot. at 21.) While it is clear that El-Hage has the right to testify, see *Rock v. Arkansas, 483 U.S. 44, 49, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987)*, it is also true that this right "'may, in appropriate cases, bow to accommodate [*25] other legitimate interests in the criminal trial process.'" *Id. at 55* (quoting from *Chambers v. Mississippi, 410 U.S. 284, 295, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973))*. In addition, given the fact that the Defendant's attorneys have seen the classified information at issue, it is not clear why El-Hage will actually suffer any such detriment.

B. The Right to Present a Defense

The Defendant claims that, as applied in this case, CIPA will impermissibly infringe upon his due process right to present a defense. (El-Hage Mot. at 22.) See *California v. Trombetta, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984)* ("To safeguard [the right to present a defense], the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'"). El-Hage's attorneys claim that their investigations are limited both by the prohibition on communication with their client and by the prohibition on communication with others outside the case. (Id. at 22-23.) For the reasons outlined in previous sections of this analysis, the Court is not persuaded that the limited restriction on El-Hage's [*26] communications with his counsel will have a detrimental impact on the Defendant's right to present a defense.

The Defendant again asserts that this is a burden that CIPA unfairly imposes only on the defense. As outlined above, the Court does not view the burdens imposed by CIPA as one-sided. See supra Section II.B.

C. The Right to Remain Silent

Finally, the Defendant alleges that CIPA's pretrial notice requirements violate his Fifth Amendment right to remain silent. (El-Hage Mot. at 25.) The Defendant relies on *Brooks v. Tennessee, 406 U.S. 605, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972)*, for the proposition that the requirement that the Defendant "provide extensive pretrial disclosure to the government in order to preserve his right to testify" is unconstitutional. In Brooks, the Supreme Court held that a Tennessee statute which required the defendant to testify at the outset of the defense case or not at all violated the defendant's constitutional right to remain silent. *Id. at 610-11*.

Previous courts have considered and rejected the attempt to apply Brooks in the CIPA context. See *Poindexter, 725 F. Supp. at 32* [*27] (rejecting defendant's argument that Section 5 of CIPA violated his right to remain silent because the statute merely requires that the defendant provide a "general disclosure as to what classified information the defense expects to use at the trial"); *Lee, 90 F. Supp. 2d at 1327* (same). Cf. *United States v. Wilson, 750 F.2d 7, 9-10 (2d Cir. 1984)* (finding "no constitutional infirmity" in CIPA's pretrial notification requirements and emphasizing that a defendant is only required to notify the court and the prosecutor of classified information that "'he reasonably expects to disclose'"). Some courts, in resolving this question, have equated CIPA's requirements with other required pretrial disclosures such as the intention to offer an alibi defense, an insanity defense, a public authority defense or certain medical tests or tangible objects. See *Poindexter, 725 F. Supp. at 33* (citing to Fed. R. Crim. Pro. 12.1, 12.2, 12.3 and 16); *Lee, 90 F. Supp. 2d at 1327* (same). These other pretrial requirements have been upheld as constitutional by the Supreme Court. See e.g. *Williams v. Florida, 399 U.S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970);* [*28] *Taylor v. Illinois, 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988)*. Given these precedents, the Court does not accept the defendant's argument that the application of CIPA's notice provisions violates his right to remain silent.

CONCLUSION

For the foregoing reasons, the Defendant's motion to declare CIPA unconstitutional as applied to him is denied.

SO ORDERED.

New York, New York

Leonard B. Sand U.S.D.J. 1/25/01

EXHIBIT C

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TERRY CHARLES JENKINS, Defendant-Appellant.
No. 98-4156

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1999 U.S. App. LEXIS 8703

January 28, 1999, Argued
May 7, 1999, Decided

NOTICE:

[*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *1999 U.S. App. LEXIS 19107*.

Certiorari Denied October 4, 1999, Reported at: *1999 U.S. LEXIS 6414*.

PRIOR HISTORY: Appeal from the United States District Court for the District of South Carolina, at Columbia. C. Weston Houck, Chief District Judge. (CR-96-358-3).

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a judgment from the United States District Court for the District of South Carolina, at Columbia, convicting defendant of murder in furtherance of a drug trafficking crime and of related drug and firearm charges.

OVERVIEW: A murder conviction was affirmed because witnesses were not bribed, the government did not violate defendant's right to counsel, and sequestration violations were not prejudicial. Defendant was convicted of murder in furtherance of a drug trafficking crime and of related drug and firearm offenses. Several witnesses were promised leniency in exchange for their testimony, and a sequestration order was violated when the witnesses were placed in the same cell. A videotape of a police interview of defendant inadvertently contained a brief portion of defendant's private conversation with his attorney. The appellate court affirmed the murder conviction because the government had the prerogative to grant leniency to witnesses, and such leniency did not constitute bribery under *18 U.S.C.S. § 201*. Because no information derived from the videotaped conversation with defendant's attorney was used at trial, defendant's right to counsel under U.S. Const. amend. VI was not violated. The sequestration violation was not material because the witnesses testified as to different matters, making collusion unlikely.

OUTCOME: The court affirmed the murder conviction because granting leniency to government witnesses was not bribery, videotaping part of a conference between defendant and his attorney did not materially interfere with defendant's right to counsel, and sequestration violations did not prejudice defendant.

CORE TERMS: sequestration, attorney-client, prejudiced, new trial, conversation, videotaping, post-trial, presume, murder, sixth amendment, taping, tape, Fifth Amendment, right to counsel, videotape, interview, pre-trial, recorded, prisoner, Jenkins's Sixth Amendment, trial testimony, panel decision, jury verdict, overturned, sequester, presumed, overlap, abused, possession of marijuana, suppression hearing

CORE CONCEPTS -

Criminal Law & Procedure: Criminal Offenses:

Miscellaneous Offenses: Witness Tampering
The federal bribery statute, *18 U.S.C.S. § 201*, prohibits the giving of anything of value to a witness because of his or her testimony. *18 U.S.C.S. § 201*(c)(2) provides that whoever directly or indirectly, gives, offers or promises any thing of value to any person, for or because of the testimony under oath given or to be given by such person as a witness upon a trial shall be fined under this title or imprisoned for not more than two years, or both.

Criminal Law & Procedure: Criminal Offenses: Miscellaneous Offenses: Witness Tampering
The government has a recognized and established prerogative to grant a witness leniency in exchange for his or her testimony.

Criminal Law & Procedure: Appeals: Reviewability: Preservation for Review
Where defendant does not object to the testimony of witnesses, an argument may stand on appeal only if permitting their testimony constitutes plain error.

Constitutional Law: Criminal Process: Assistance of Counsel
Not all government interference with the attorney-client relationship renders counsel's assistance so ineffective as to violate a defendant's Sixth Amendment, U.S. Const. amend. VI, right to counsel. Instead, such interference does not create a Sixth Amendment claim unless the defendant makes some showing of prejudice.

Criminal Law & Procedure: Witnesses: Sequestration
Criminal Law & Procedure: Appeals: Standards of Review: Standards Generally
When a district court discovers that its sequestration order has been violated, the court may exercise its discretion in crafting an appropriate remedy. The choice of remedy depends upon the particular circumstances and lies within the sound discretion of the trial court. The appellate court therefore reviews the district court's resolution of this issue for abuse of discretion.

Criminal Law & Procedure: Witnesses: Sequestration
Where factual overlap between witnesses' testimony is nonexistent or minimal, sequestration order violations are unlikely to undermine the integrity of the factfinding process.

Criminal Law & Procedure: Witnesses: Sequestration
Courts have refused to presume prejudice from the violation of a sequestration order when it appears that the discussions that took place between the witnesses had no substantial influence on the jury verdict.

COUNSEL: ARGUED: David Isaac Bruck, Columbia, South Carolina, for Appellant.

Scarlett Anne Wilson, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

ON BRIEF: J. Rene Josey, United States Attorney, Scott Schools, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

JUDGES: Before WILKINS, MOTZ, and KING, Circuit Judges.

OPINION:

OPINION

PER CURIAM:

Terry Charles Jenkins was convicted of conspiracy to distribute marijuana, possession of marijuana, possession of a firearm and ammunition by a convicted felon, and murder in furtherance of a drug trafficking crime. He now challenges his murder conviction on several grounds. Finding no error below, we affirm.

I.

On October 31, 1995, Andre Weston was shot and killed outside Columbia, South Carolina, apparently in connection with a drug sale. In April[*2] 1997, Terry Charles Jenkins was indicted for Weston's murder, at which time Jenkins was already under indictment for various drug- and weapon-related offenses. At trial in district court in the District of South Carolina, Jenkins conceded guilt on all drug and weapons charges, but denied having murdered Weston.

Shortly before trial, the Government notified Jenkins's counsel that it had obtained a videotape that had been recorded in the interview room of the Lexington County, South Carolina, sheriff's office. The tape showed a lengthy interview between Jenkins; his attorney, Theo Williams; and officers of the Lexington County Sheriff's Department, Scottie Frier and Carlisle McNair. In addition to this interview, the beginning of the tape contained a twenty-second recording of Jenkins's private, pre-interview conference with his attorney, Mr. Williams. n1 Although the Government represented that it had learned of the videotape only shortly before trial and that none of its trial evidence against Jenkins had been derived from the private attorney-client conference, Jenkins moved to suppress the contents of the videotape and to dismiss the murder charges, arguing that improper taping[*3] of the attorney-client conference violated his Sixth Amendment right to counsel.

n1 During the recorded attorney-client conference,

Jenkins and Mr. Williams discussed why Jenkins had been calling Weston's beeper number on the night of the murder. Jenkins admitted contacting Weston "to get the drugs." In the ensuing interview, Jenkins acknowledged involvement in the drug trade and to having planned to meet Weston for a drug sale on the night of the murder.

In preparation for the pre-trial suppression hearing, Jenkins sought to depose officers McNair and Frier. However, each officer invoked his Fifth Amendment right not to testify. At the suppression hearing, Jenkins conceded that he could not demonstrate that he had been prejudiced by the improper taping of his conference with Mr. Williams. The district court denied Jenkins's motion to dismiss, but suppressed the portion of the tape depicting Jenkins's attorney-client conference with Mr. Williams, as well as the video portion of the remainder of the tape.

Before[*4] trial, the district court entered a sequestration order pursuant to Federal Rule of Evidence 615, under which all witnesses were excluded from the courtroom and were expressly forbidden from discussing their testimony with each other. At trial, four of the Government's witnesses were prisoners who testified that Jenkins had confessed to murdering Andre Weston. Two of these witnesses, Steve Johnson and Ricky Tyler, testified in exchange for the Government's promise to move for a reduction in their respective sentences. See Fed. R. Crim. P. 35. Another prisoner, John Cordero, was ordered to testify after he was granted immunity. The fourth "admission" witness, Jessie Lord, apparently received nothing in exchange for his testimony.

On October 23, 1997, a jury convicted Jenkins of all charges, including the murder charge. The district court then sentenced Jenkins to life imprisonment for the murder conviction, five years for possession of marijuana with intent to distribute, and ten years for being a felon in possession of a firearm and ammunition. Shortly after trial, Jenkins submitted to the district court the affidavit of John Cordero, who alleged that he, Lord, Johnson, Tyler, [*5] and another government witness, Harry Renwrick, had all discussed their testimony during the trial, while all five witnesses were being held in the same cell. Cordero alleged that the witnesses had collaborated on how to testify falsely at trial.

On the basis of Cordero's affidavit, Jenkins moved for a new trial or for dismissal of the homicide charges. Additionally, Jenkins again raised his argument that the charges should be dismissed on the basis of the improper taping of his attorney-client conference with Mr. Williams. At the post-trial hearing, Jenkins called Renwrick, who testified that he had discussed only minor details of his testimony with the other prisoners who testified at trial. Jenkins also presented Lieutenant Harold Phillips, who had been the supervisor of officers McNair and Frier during the time the attorney-client conference was videotaped. Phillips testified to some of the circumstances regarding the videotaping incident, but invoked the Fifth Amendment as to other details of the incident.

The district court denied all of Jenkins's post-trial motions. With respect to the sequestration violations, the district court found that Cordero's affidavit was not credible. [*6] It further found, based on Renwrick's testimony, that any violations of the sequestration order had been "innocuous" or "very nominal" and had not prejudiced Jenkins. Further, the district court again rejected Jenkins's claim that the videotaping had violated his right to counsel.

Jenkins now appeals, arguing that his conviction should be overturned because (1) the Government violated *18 U.S.C. § 201*(c)(2) by offering several of its witnesses favorable treatment in exchange for their testimony; (2) the videotaping of Jenkins's attorney-client conference with Mr. Williams violated Jenkins's Sixth Amendment rights; and (3) several witnesses violated the district court's sequestration order.

II.

Jenkins devotes the bulk of his brief to the argument that his conviction must be overturned because some of the Government's witnesses testified in exchange for the Government's promise to move that the witnesses' sentences be reduced. Jenkins claims that this practice violates provisions of the federal bribery statute, *18 U.S.C. § 201;* specifically, § 201(c)(2), which prohibits the giving of "anything of value" to a witness because of his or her testimony. n2

n2 The relevant portion of *18 U.S.C. § 201*(c)(2) provides as follows:

Whoever . . . directly or indirectly, gives, offers or promises any thing of value to any person, for or because of the testimony under oath . . . given or to be given by such person as a witness upon a trial . . . shall be fined under this title or imprisoned for not more than two years, or both.

[*7]

Last year, a panel of the Tenth Circuit became the only court to adopt the argument made by Jenkins. The panel decision has since been vacated by the en banc court. See

United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), rev'd en banc, *165 F.3d 1297 (10th Cir. 1999)*. n3 Significantly, this circuit has never followed the original Singleton panel decision, and we will not do so today.

n3 The Singleton panel opinion rested on its reading of what, it determined, was the plain meaning of § 201(c)(2). Namely, it concluded that (1) "whoever" included Assistant United States Attorneys ("AUSAs") and that (2) an AUSA's promises not to prosecute certain offenses and to inform the authorities of the witness's cooperation were "things of value" given in exchange for trial testimony. *144 F.3d at 1345-51*.

In reversing the panel, the en banc Tenth Circuit concluded that "whoever" does not include AUSAs appearing on behalf of the *United States. 165 F.3d at 1299-1300*. The court reasoned that "whoever" could not include AUSAs, as they are, in effect, the United States government, which cannot be subjected to criminal prosecution. Id. Further, the court reasoned that applying the statute to the United States would be absurd and would deprive the government of its "recognized or established prerogative" to grant a witness leniency in exchange for his or her testimony. *Id. at 1300-01*.

[*8]

In addition, Jenkins has a serious procedural problem in his presentation of this issue because he did not object on this ground to the testimony of the witnesses in question. Consequently, his current argument may stand only if permitting their testimony constitutes plain error. See *United States v. Olano, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)*. Given that the rationale of the Singleton panel has never been adopted in this circuit, and that it is a flawed theory--as explained by the Tenth Circuit en banc and by all other circuits to consider the issue n4--any arguable error in admitting the testimony in question is not plain. This claim must be soundly rejected.

n4 E.g., *United States v. Condon, 170 F.3d 687, 1999 WL 118719 (7th Cir. 1999); United States v. Johnson, 169 F.3d 1092, 1999 WL 55234* (8th Cir., 1999); *United States v. Lowery, 166 F.3d 1119 (11th Cir. 1999); United States v. Ramsey, 165 F.3d 980 (D.C. Cir. 1999); United States v. Webster, 162 F.3d 308 (5th Cir. 1998); United States v. Ware, 161 F.3d 414 (6th Cir. 1998)*.

[*9]

III.

Jenkins next argues that he is entitled to a new trial because a portion of a confidential conversation between Jenkins and his attorney was improperly recorded by the Lexington County sheriff's office. Jenkins claims that this recording interfered with his right to consult privately with his attorney, thereby violating the Sixth Amendment's guarantee of effective assistance of counsel. We reject this claim for relief.

Although all agree that the videotaping of Jenkins's confidential conversation was improper, this impropriety did not automatically violate Jenkins's Sixth Amendment rights: "'Not all government interference with the attorney-client relationship,' however, 'renders counsel's assistance so ineffective as to violate a defendant's sixth amendment right to counsel.'" *United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990)* (quoting *Hall v. Iowa, 705 F.2d 283, 290 (8th Cir. 1983))*. Instead, such interference does not create a Sixth Amendment claim unless the defendant makes "some showing of prejudice." *Chavez, 902 F.2d at 266* (citing *Weatherford v. Bursey, 429 U.S. 545, 558, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977))*.

Here, Jenkins has presented no[*10] evidence of prejudice. To the contrary, after separate pre-trial and post-trial hearings on the issue, the district court twice found that none of the Government's evidence derived from the improperly recorded conversation. Such factual findings, which Jenkins has not shown to be clearly erroneous, defeat Jenkins's argument. See *Weatherford, 429 U.S. at 556* (defendant's Sixth Amendment claim defeated by district court's findings that Government did not use information gained from defendant's attorney-client conversation).

Jenkins nevertheless urges us to presume that the videotaping prejudiced his rights because the officers apparently responsible for the taping refused to testify, invoking their Fifth Amendment rights. Although the officers' refusal to testify no doubt hampered Jenkins's attempt to prove prejudice, no authority suggests that we should, as a result, presume that prejudice occurred. In fact, the Supreme Court has disapproved of such presumptions of prejudice. See id. Consequently, we decline Jenkins's invitation to resurrect this invalidated presumption, and we reject his argument on this issue.

IV.

Finally, Jenkins argues that the district court erred[*11] in failing to grant him a new trial because, he maintains, several of the Government's witnesses violated the district court's sequestration order. Specifically, Jenkins

claims that witnesses Cordero, Lord, Tyler, Renwrick, and Johnson discussed their testimony in violation of the sequestration order. In support of this argument, Jenkins submitted Cordero's affidavit, in which Cordero alleges that he and the other witnesses violated the sequestration order. After a post-trial hearing on the matter, during which Renwrick was examined by both sides, the district court refused to grant a new trial.

When a district court discovers that its sequestration order has been violated, the court may exercise its discretion in crafting an appropriate remedy. See *United States v. Leggett, 326 F.2d 613 (4th Cir. 1964)* (choice of remedy "depends upon the particular circumstances and lies within the sound discretion of the trial court"). We therefore review the district court's resolution of this issue for abuse of discretion.

We cannot say that the district court abused its discretion in refusing to grant Jenkins a new trial. After reviewing Cordero's affidavit and after hearing Renwrick's testimony[*12] about his conversations with the other witnesses, the district court determined that Jenkins had not been prejudiced by those conversations. In making this ruling, the district court noted that prejudice was unlikely because the subject matter of the individual witnesses' testimony had not overlapped significantly: "All of these guys that testified saw the same smoking gun, but they saw it at different times from different angles and they described it in entirely different terms." Indeed, the only overlap of testimony was that both Cordero and Lord testified that Jenkins had asked how to get blood out of a car. Where factual overlap between witnesses' testimony is nonexistent or minimal, sequestration order violations are unlikely to "undermine[ ] the integrity of the factfinding process." *United States v. Kosko, 870 F.2d 162, 164 (4th Cir. 1989)*. As a result, we conclude that the district court was well within its discretion in finding that Jenkins had not been prejudiced by the alleged sequestration violations and, consequently, in denying Jenkins a new trial.

Jenkins counters that United States v. Farnham requires us to presume that any violation of a sequestration order[*13] is prejudicial. See *791 F.2d 331, 335 (4th Cir. 1986)*. While we did presume prejudice from the particular violation at issue in Farnham, we did not establish the per se rule for which Jenkins argues. In Farnham, we presumed that the defendant had been prejudiced by the district court's improper refusal to sequester one of two agents who were scheduled to testify for the Government. Because there was no sequestration, the first agent was able to listen to the entire testimony of the second agent before giving his own testimony. As a result, we concluded that the defendant in Farnham would have found it "almost impossible" to prove that he had been prejudiced by the district court's failure to sequester, thus we presumed that the district court's error prejudiced the defendant. *791 F.2d at 335*.

But the Farnham presumption does not apply in all cases. For example, we have refused to presume prejudice--and specifically refused to invoke Farnham's rule--when it appears that "the discussions that took place between the witnesses had no substantial influence on the jury verdict." *United States v. Harris, 39 F.3d 1262, 1268 (4th Cir. 1994)*.

Furthermore, Jenkins[*14] did not face the near impossibility of proving prejudice that Farnham faced. Jenkins had the opportunity to call each of the five allegedly tainted witnesses at the post-trial hearing; he called only Renwrick, whose testimony did not corroborate Cordero's affidavit. Additionally, each of the witnesses in question had submitted statements to the investigating authorities long before trial, and Jenkins has failed to point to any detail in which the witnesses' trial testimony varied from their pre-trial statements. As a result, Jenkins simply has not shown how the discussions that Cordero describes in his affidavit improperly affected any testimony. Accordingly, we cannot conclude that any such discussions had a substantial effect on the jury verdict. *Harris, 39 F.3d at 1268*. We therefore reject Jenkins's claim that the district court abused its discretion in denying Jenkins a new trial on this basis.

V.

Pursuant to the foregoing, the assertions of error made by Jenkins are all rejected, and his convictions are affirmed.

AFFIRMED